



Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 01 of 2020

Dr. Zahra Gauhar

...Appellant

Versus

i. Securities and Exchange Commission of Pakistan

...Respondent No.1

ii. NAFA Funds/NBP Funds, The National Bank of Pakistan
Through its President

...Respondent No.2

Date of Hearing: 23/07/2020

Present:

For the Appellant:

Dr. Zahra Gauhar

For the Respondent No.1

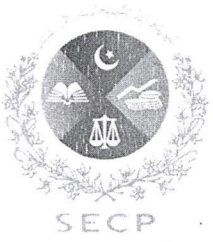
Ms. Amina Aziz, Director (Adjudication-1)

For the Respondent No.2

- i. Dr. Amjad Waheed, Chief Executive (NBP Fund Management Ltd)
- ii. Mr. Muhammad Murtaza Ali, Chief Operating Officer & Company Secretary (NBP Fund Management Ltd)
- iii. Mr. Rabel Z. Akhund, Founder and Managing Partner & Advocate High Court, Akhund Forbes Hadi

ORDER

1. This Order is passed in the matter of Appeal No.1 of 2020 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 (the SECP Act) against the order dated 04/09/19 (the Impugned Order) passed by Commissioner (Specialized



Securities and Exchange Commission of Pakistan

Companies Division) of the Securities and Exchange Commission of Pakistan (the Respondent No.1).

2. The brief facts of the case are that Ms. Zahra Gauhar (the Appellant) approached the Respondent No.1 with her complaint via the complaint management system (SDMS) on 28/01/19 (the Complaint). The Appellant informed that she had opened an investment account with NBP Fund Management Limited (the Respondent No.2) on 16/08/16 and had made two investments of Rs. 10 million each on 16/08/16 and 06/10/16 respectively, in NAFA Income Opportunity Fund (the NIOF). The Appellant was a walk-in customer, therefore, no front-end load (the FEL) was to be charged on these investments in terms of Circular 26 of 2015. Thereafter, the Appellant further invested an amount of Rs 1.8 million in NIOF on 07/02/17 but an amount of Rs 17,821 was charged as FEL along with taxes on FEL of Rs 2,316 on the said investment. Subsequently, the Appellant requested the Respondent No.2. for a fund-to-fund conversion from NIOF to NAFA Stock Fund (the NSF) on 24/04/17 amounting to Rs 22.375 million against which Respondent No.2 charged Rs. 219,366 as FEL and Rs. 28,517 taxes on FEL. The aggregate amount charged as FEL (including taxes on FEL) amounted to Rs. 268,020. Furthermore, as informed by the Appellant and is evident from her account statement, no FEL was charged on the above-mentioned first two investments of Rs. 10 million each on 16/08/16 and 06/10/16, respectively in NIOF. The Respondent No.2, however, charged FEL on two subsequent transactions without any prior intimation to the Appellant about charging load or change in Appellant's policy of charging FEL. The complaint was referred by the Appellant on 28/01/19. On 08/02/19, Respondent No.2 informed that it had replied directly to the Appellant vide letter dated 31/12/18. In its letter, Respondent No.2 had informed the Appellant that investment was made in NSF at a time when the market had started to decline due to political and economic instability and consequently, the returns began to decline along with the principal invested in the equity fund. Respondent No.2 further stated that the deduction on account of FEL was communicated to the Appellant through the account statement set within 48 hours of the investment transaction. The Appellant responded back on 14/02/19 and informed that she was not satisfied with the reply. She alleged that blank investment forms duly signed by her had also been obtained by the sales staff of Respondent No.2 to carry out future transactions. The Appellant requested Respondent No.1 to investigate the matter in depth. The complaint was referred to Respondent's No.1 Specialized Companies Division (Supervision



Securities and Exchange Commission of Pakistan

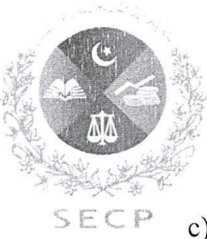
and Enforcement Department) on 14/02/19 for further scrutiny where the complaint was examined in detail, along with available evidence. The matter was taken up with Respondent No.2 vide email dated 18/02/19. Furthermore, some aspects of the complaint (call center records, CCTV recording etc.) were also referred to the inspection team which was conducting an onsite inspection of the Respondent No.2 at the time for further verification. Upon review of the information/documents provided by Respondent No.2, the inspection team reported certain observations which are as under:

- a. It was noted that the account opening form of the Appellant contained a statement "Sales Load off 100%", due to which the Respondent No.2 did not charge any FEL on the Appellant's first two investments in NIOF but had charged FEL on her next two transactions. The Appellant, however, was not informed about any change of FEL policy on her transactions.
 - b. The Appellant had not been provided any proof/note/investor's copy of the form as an acknowledgment or receipt of the transaction form.
 - c. The Respondent No.2 did not have any authentic and verifiable mechanism to classify transactions between walk-in customers or customers approached by sales staff. Sales staff were responsible for ticking the appropriate check box on the form i.e. 'Self' or 'Approached by Sales staff', and the operations department or any other relevant department was completely dependent on sales staff for filling in the correct information.
 - d. The Appellant asserted that the transactions were conducted in her absence, while she was away for official trainings, through pre-signed blank forms earlier obtained by sales staff. The Respondent No.2 was directed to provide the account statement of the Appellant and respond to the above observations.
3. Respondent No.2 was called upon to show cause in writing as to why penal action should not be taken against the Respondent No.2 under section 282J(1) read with Section 282M(1) of the Companies Ordinance, 1984 (the Ordinance) in violation of Regulation 38(1)(a) & 38(2)(1) of the Non-Banking Finance Companies and Notified Entities Regulations, 2008 (the NBFC Regulations). A written reply was received vide letter dated 12/07/19 from Respondent No.2 and hearing in the matter took place on 01/08/19 which was attended by Dr. Amjad Waheed, Chief Executive Officer and Mr. Raheel Rehman, Head of Compliance of the Respondent No.2. They reiterated the facts stated in their written reply.



Securities and Exchange Commission of Pakistan

4. Respondent No. 1 dissatisfied with the response of the Respondent No.2 held that all fund managers should demonstrate at all times, the highest standards of professionalism by complying with all relevant provisions of the prevailing regulatory framework. Furthermore, any negligence or contravention with the relevant provisions cannot be viewed leniently. Respondent No.1 held that the Appellant had to be considered as a walk-in-client and not a customer being approached by the sales agent as incorrectly indicated by Respondent No.2. Furthermore, in case of walk-in client no sales load is to be charged in terms of Circular 26 of 2015. Respondent No.1 further held that the inspection team also verified that Respondent No.2 did not have any authentic and verifiable mechanism to classify transactions as walk-in customers or approached by sales staff. Moreover, Respondent No.2 also had informed the inspection team that no log was being maintained for walk-in customers. Respondent No.1 further held that the Appellant had no prior intimation of the deduction nor was she provided with a copy of the form or any other receipt which confirmed that sales load will be deducted to the extent of 50%. Furthermore, the Appellant was neither provided any proof/investor's copy of the form as an acknowledgment or receipt of the transaction form, in contravention of the offering documents nor evidence of any SMS being sent to the registered mobile number of the investor was provided by the Respondent No.2 to prove its claim. As a result of contravention of Regulations 38(1)(a) and 38(2)(1) of the NBFC Regulations including inability of the Respondent No.2 to carry out its fiduciary responsibilities adequately, Respondent No.2 was directed by Respondent No.1 to reimburse FEL deducted from the Appellant amounting to Rs 268,020/-.
5. The Appellant preferred the instant appeal *inter alia* on the following grounds:
- The Appellant had called the relationship manager Mr. Imran Rasheed (the Relationship Manager) to finish business ties with the Respondent No.2 on 14/12/18. The Appellant suffered a loss of Rs 206,278.20/- as the Relationship Manager wrongly filled in Form 6 and did not process it in time on 13/12/18 before the cut off time of 4:00 pm. The Respondent No.1 has already established that Respondent No.2 had been obtaining pre-signed blank forms, however, they did not further scrutinize it or take action.
 - The name of National Bank of Pakistan (the NBP) was used to attract the general public to invest with Respondent No. 2 and the Appellant was deceived causing her mental and physical agony.



Securities and Exchange Commission of Pakistan

- c) The Appellant had requested Respondent No.2 to provide carbon copies of redemption and investment requests related to my transactions which are to date have not been provided. The Relationship Manager had not provided records and copies and most of the transactions were conducted on blank forms while the Appellant remained busy on out stationed assignments. The Respondent No.2's integrity with its investors is in doubt as a result of irresponsibility and mishandling of funds alongside manipulation of documents.
- d) The Respondent No.2 does not have call records which should have been obligatory to ensure compliance and the Appellant was asked as an investor for such records. The Appellant does not believe the Respondent No.2 does not have any record of the calls.
- e) The Respondent No.2 claimed that waiving 50% sales load off by sales agent was with consent, however, this was not the case. The Respondent No.2 kept changing stances over it multiple times.
- f) The Appellant's husband as an investor of Respondent No.2 had grievances against them with concrete evidences of wrong doing as a result of which FEL was also deducted multiple times. The complaint was also reported from branch manager to CEO of Respondent No.2 telephonically and over text messages but the complaints were never addressed. The Respondent No.2's agents never met the Appellant's husband at their home and the Appellant demands all the records of Respondent No.2 which prove their claim that their agents met the Appellant's husband.
- g) The Appellant pleads that all losses incurred by the Appellant to date be fully reimbursed which were a result of the unauthorized transactions.
6. Respondent No.1 rebutted the arguments of the Appellant *inter alia* on the following grounds:
- a) Respondent No.2 has examined the facts of the case, written responses submitted along with documentary evidences and the arguments put forth by the Appellant during the course of the hearing and the relevant regulatory requirements. After thorough examination of the matter, Respondent No.1 deemed it fit to issue a warning and direct the Respondent No.2 to reimburse FEL to the Appellant.
- b) The Complaint filed did not contain anything about losses incurred or about conflict with the Relationship Manager. The Appellant had alleged that Respondent No.2 had wrongfully deducted FEL on her investment. The adjudication proceedings were carried out against Respondent No.2 for not carrying out its fiduciary obligations as an Asset Management



Securities and Exchange Commission of Pakistan

Company (AMC) in terms of the relevant regulatory framework. Furthermore, the Appellant had asserted that the transactions were conducted in her absence while she was away for official trainings through pre-signed blank forms earlier obtained by sales staff. Since the Appellant had accused the Respondent No.2 of obtaining pre-signed blank forms from her, the same was highlighted in the SCN. It was not established, however, by Respondent No.1 that Respondent No.2 had been obtaining pre-signed blank forms from the Appellant. Furthermore, handing over signed blank forms is also a lapse of judgment on part of the Appellant.

- c) The Appellant has argued that the sales representative had conducted redemption and investment transactions on blank forms while she was away on official assignment. Signed forms, however, is implied authorization and approval of the Appellant to conduct the respective transactions and cannot be construed as mishandling of funds.
- d) Maintenance of walk-in customer logs by AMCs is not a requirement of the applicable regulatory framework. The Appellant had requested to appear before the Respondent No.1 to explain her stance that was acceded to but it was not incumbent on them to provide opportunity of hearing since she was not a respondent in the matter. It was in no way an attempt to harass the Appellant. The Appellant was asked to obtain phone records from the phone companies as evidence to substantiate her arguments and prove that the sales representative had been mishandling the funds.
- e) Respondent No.2 was directed to reimburse the FEL deducted from the Appellant due to contravention of the Regulations 38(1)(a) and 38(2)(1) of the NBFC Regulations including inability of the Respondent No.2 to carry out its fiduciary responsibilities adequately. It was not possible, however, for Respondent No.2 to adjudicate on any losses incurred by the Appellant as the Complaint filed by the Appellant only pertained to FEL being charged.

7. The Respondent No.2 rebutted the arguments of the Appellant *inter alia* on the following grounds:

- a) The Impugned Order is erroneous in facts and law to the extent that it does not put any liability or burden on Respondent No.2 to compensate the Appellant for its losses. The Appellant intended to process the conversion from one fund to another or Exchange of Units in Funds (the EOUF) on 13/12/18 by calling the sales staff of Respondent No.2 at 4:34 pm. The cut-off timings for the processing of a transaction/request of Respondent No.2 is 4:30 pm and as per the regulations of Respondent No.2, a transaction (a request for which is received after the cut-off time) is processed



Securities and Exchange Commission of Pakistan

on the next business day. Therefore, the Appellant's request for immediate processing was refused.

- b) Any and all EOUF's clearly state the fact regarding the cut-off timings and processing of transactions on the next business day if a request or form is received after this time. It also explicitly provides that Respondent No.2 would not be liable for any loss that results from the processing of the transaction the next business day. Furthermore, having filled out numerous forms and invested with Respondent No.2 for over three years along with her husband who had also invested with Respondent No.2 for a number of years, the Appellant could reasonably be expected to have known about this policy. Moreover, the Appellant invested and then decided to leave the NSF atleast fourteen (14) times during the course of the business relationship with Respondent No.2.
- c) The Appellant is an educated professional whose husband has invested with Respondent No.2 for a few years and who would have reasonably been expected to understand the repercussions of signing a blank form. The relevant forms show the Appellant's signature which proves that the relevant transactions/conversions were carried out with her prior knowledge/consent and the Appellant was fully aware of the risk of investing in mutual funds. Furthermore, some forms such as the Conversion form dated 26/07/18 was signed multiple times by the Appellant to fix errors which clearly show that the Appellant had knowingly invested with Respondent No.2 and is backtracking her investment decision which she is unable to do under the law.
- d) The argument of the Appellant that all losses be reimbursed will set a dangerous precedent. It has the potential to open the floodgates for various claims by clients/investors who suffered losses as a result of risky investments (with prior knowledge of such risk) that transactions were carried out on pre-signed blank forms, without obtaining their consent/or their prior knowledge, simply on the basis of their word of mouth without requiring any corroborating evidence of the fact. The ultimate burden is on the investor to be vigilant. The Appellant was getting monthly account statement in which loss was clearly visible. The Appellant had withdrawn her entire investment from NSF on 16/06/17 after suffering a loss of 4.6%, but she kept on re-investing in the said Fund despite suffering a loss. Multiple conversions clearly show that the Appellant knew the risks involved and was simply playing the stock market based on her own intuitions through NSF. If the Appellant had been a risk averse investor, she would have not re-invested in NSF after experiencing an initial loss of 4.6%, and then withdrawing all her investments from the NSF. The



Securities and Exchange Commission of Pakistan

sales staff of Respondent No.2 are barred from obtaining any blank pre-signed forms from any investor and to ensure this, an acknowledgment is obtained from the sales staff through their signatures on the Standard Code of Ethics for Sales and Marketing Staff. The purpose of the Standard Code of Ethics for Sales and Marketing Staff is for regulatory purposes to prevent the Sales Staff from being negligent or being involved in malpractice of any sort. The Respondent No.2 also sends out confirmation emails to the investors when investments/conversions are undertaken on their behalf. Therefore, in the instant case too, relevant confirmation emails, letters and account statements were also sent each time a fund to fund transfer took place. These prove that everything in relation to the Appellant's investment with Respondent No.2 was carried out with her knowledge. Furthermore, the fact that the Appellant undertook various transactions over the course of her investment with Respondent No.2, without raising any official complaints regarding any of the transactions prove on an objective basis that everything was carried out with her prior consent and knowledge.

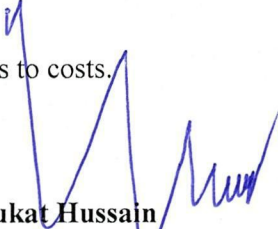
- e) The Respondent No.2 is not using the name of NBP as claimed by the Appellant. The logo of NBP Funds is different from that of NBP. Moreover, AMCs which are subsidiaries of banks such as United Bank Ltd, Habib Bank Ltd, Meezan Bank Ltd, Bank Alfalah Ltd, Muslim Commercial Bank Ltd, Faysal Bank Ltd, Allied Bank Ltd, JS Bank Ltd and Bank Al-Habib Ltd are also not restricted from using the name of their parent organization in their respective logos by the Respondent No.1. It can objectively be gauged that the Appellant knew that she was dealing with and making an investment with a subsidiary/affiliate company of NBP rather than making a deposit or otherwise dealing with NBP itself.
8. We have heard the parties i.e. the Appellant and the Respondents and perused the documents/evidence provided to us both during and after the hearing. We concur with Respondent No.1 that FEL was wrongly charged in contravention of Regulations 38(1)(a) and 38(2)(1) of the NBFC Regulations, however, we have observed that no penalty was imposed. Therefore, we remand the matter to the Respondent No.1 to look into why no penalty was imposed on Respondent No.2 for the said violations. We have also observed that SCN is limited to the issue of FEL, therefore, we cannot adjudicate on issues which are beyond the scope of SCN and Impugned Order. The matter regarding recovery of losses should be pursued by the Appellant at the appropriate forum. Furthermore, we concur with Respondent No.2 that their logo as an AMC is different from that of NBP and it was not misleading investors in any way.



Securities and Exchange Commission of Pakistan

9. The appeal is disposed of accordingly with no order as to costs.


Shauzab Ali
Commissioner (SMD)


Shaukat Hussain
Commissioner (CLD-CCD)

Announced on: **01 OCT 2020**